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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

KELLI GRAY and all others similarly situated, Plaintiffs, v. SUTTELL & ASSOCIATES, P.S.; et al., Defendants.	No. CV-09-251-EFS (consolidated with No. CV-10-5132 EFS) MEMORANDUM IN SUPPORT OF SUTTELL DEFENDANTS' MOTION TO DISMISS CLAIMS BROUGHT UNDER CONSUMER PROTECTION ACT

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EVE LAUBER, et al.,

Plaintiffs,

v.

ENCORE CAPITOL GROUP INC.; et al.,

Defendants.

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the Suttell Defendants[1] move to dismiss all of plaintiffs'[2] claims alleging violations of the Washington Consumer Protection Act (CPA), RCW 19.86.[3] The CPA does not

[1] The "Suttell Defendants" are Suttell & Hammer, P.S., Suttell & Associates, Mark T. Case and Jane Doe Case, Malisa L. Gurule and John Doe Gurule, Karen Hammer and Isaac Hammer, and Bill Suttell and Jane Doe Suttell.

[2] Although the Court denied Marla Herbert and Ruby Marcy's motion to intervene, Dkt No. 299 at 13, plaintiffs' counsel has joined them in the case; the motion would apply equally to their claims if they are subsequently allowed to bring them.

[3] The Suttell Defendants are separately moving to dismiss plaintiffs' claims alleging that it is "illegal" to request a "fixed fee." Dismissal of those claims in their entirety would moot portions of this motion. In addition, the Suttell

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permit a party from a prior lawsuit to bring a subsequent claim against his adversary's counsel based on the attorney's filings in the first lawsuit. Allowing such an expansion of Washington law would have dire and far-reaching consequences that would fundamentally undermine the attorney-client relationship, chill the zealous advocacy that is required of lawyers in this State, and spawn endless satellite litigation by disappointed litigants who lost in prior state court proceedings.

The Suttell Defendants additionally (and alternatively) request that the CPA claims of plaintiffs Gray, Lauber, Boolen and Finch be dismissed for want of any allegation of injury to business or property.

II. LEGAL STANDARD AND ALLEGATIONS

Under Rule 12(b)(6), a "court may dismiss a complaint as a matter of law for (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal claim." *SmileCare Dental Group v. Delta Dental Plan of*

Defendants believe plaintiffs' claims under the Fair Debt Collection Practices Act are deficient as well, but will brief that at a later date, *see O'Rourke v. Palisades Acquisition XVI, LLC*, __ F.3d __, 2011 WL 905815 (7th Cir. 2011), along with other grounds for dismissal of plaintiffs' claims, such as res judicata, collateral estoppel and *Rooker-Feldman*.

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California, Inc., 88 F.3d 780, 783 (9th Cir.), *cert. denied*, 519 U.S. 1028 (1996) (internal citation and quotation omitted). Well-pleaded factual allegations in the complaint are assumed correct for purposes of a 12(b)(6) motion, *id.* at 782-83, although Courts are not bound to accept as true "a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2010). The complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level" and provide more than a "formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

Although there are a host of allegations in plaintiffs' recently filed Amended Complaint Related to Attorney's Fees, Statute of Limitations, and Licensing (the "Amended Complaint") [Dkt. No. 297], only a handful are relevant to the legal question of whether a party may assert a CPA claim against an adversary's attorney for filings the attorney made in a prior lawsuit.

Plaintiffs' Amended Complaint is based on allegedly improper debt collection methods, and they bring claims against the Suttell Defendants under both the Fair Debt Collection Practices Act (FDCPA) and the CPA. The Suttell Defendants, acting on behalf of their creditor client, are alleged to have sued plaintiffs in individual state court lawsuits to collect debts and during those suits

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submitted affidavits and records to the state courts. When permitted by contract, the Suttell Defendants are alleged to have requested fees–$650 in the case of a default judgment, $850 when they were required to brief and argue a summary judgment motion. *E.g.* Amended Complaint, ¶¶ 6.18-6.32, 7.25-7.41. Based on the allegations in the Amended Complaint, in many instances it appears that the fees were awarded by the reviewing court.[4] Plaintiffs further allege that the Suttell Defendants wrongfully prosecuted claims that plaintiffs contend to have been barred by the governing statute of limitations, *e.g.*, *id.*, ¶¶ 6.11-6.12, although its is unclear whether plaintiffs are asserting claims against the Suttell

[4] In cases in which the requested fees were awarded against the plaintiffs, they have no claim against the Suttell Defendants. In awarding fees, the state court necessarily determined that the requested fees were reasonable, a conclusion that cannot be revisited in a subsequent federal case. *See Medialdea v. Law Office of Evan L. Loeffler, PLLC*, 2009 WL 1767185, at *7 (W.D. Wash. 2009) ("Plaintiffs' attempt to re-litigate their state court case via a federal FDCPA suit fails."); *Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1032 (9th Cir. 2005). Moreover, a collateral challenge to the state court judgments would violate *Rooker-Feldman*. If necessary, these issues will be thoroughly briefed at a later date with a more complete factual record.

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Defendants under the CPA based on these allegations. *Compare id.*, ¶¶ 15.18-15.32 (allegations against the Suttell Defendants in the CPA count) *with* ¶ 13.5 (alleging statute of limitation as basis for claim under FDCPA).

Plaintiffs' CPA claims are thus based solely on the allegations that the Suttell Defendants filed allegedly deceptive papers during the prior lawsuits as substantive support for the debt-related claims,[5] and then filed allegedly deceptive affidavits or motions in support of a fee request and/or acted improperly in requesting a fixed fee rather than preparing a detailed case-specific fee application based on a detailed lodestar calculation.

While plaintiff Scott alleges injury to property, *id.*, ¶ 8.29, plaintiffs Gray, Lauber, Boolen and Finch make no such allegation.

[5] The claims that the Suttell Defendants and/or their clients filed deceptive affidavits are not pled in the Amended Complaint. The Suttell Defendants believe such claims are properly stayed by virtue of the injunction entered in the *Brent* case, although if, or when, such claims are litigated in this Court, the rationale for dismissal of the CPA claims that is presented herein will apply equally to such claims.

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II. ARGUMENT

A. Plaintiffs Have No CPA Claims Against the Suttell Defendants

Plaintiffs' CPA claims against the Suttell Defendants, all of which are based on their filings on behalf of a client in prior state court lawsuits, are properly dismissed as a matter of law. Legal services are generally exempt from the CPA, and plaintiffs' allegations do not fall within the narrow exception for "entrepreneurial" activities relating to obtaining or billing clients. No Washington court has ever held to the contrary, as evidenced by two District Court opinions on similar issues. The consequences that would follow from plaintiffs' expansive interpretation of the CPA demonstrate why no Washington court has, or will, adopt their interpretation.

1. Plaintiffs' CPA Claims Do Not Fall Within The Narrow Exception Allowing Limited Suits Against Lawyers.

To prevail on a claim under the Washington Consumer Protection Act, a plaintiff must establish five elements: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). The Suttell Defendants' instant motion to dismiss is directed to the narrow question of whether an

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attorney's filings in a prior lawsuit occur in "trade or commerce" for the purposes of a subsequent CPA claim by the party that was adverse in the first lawsuit.[6]

Although the practice of law is generally exempt from the CPA because it does not satisfy the "trade or commerce" element, the Washington Supreme Court has created a narrow exception for "the entrepreneurial aspects of legal practice—how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses clients. These business aspects of the legal profession are legitimate concerns of the public which are properly subject to the CPA." *Short v. Demopolis*, 103 Wn.2d 52, 61 (1984). Claims attacking an attorney's "actual practice of law," including claims directed to the "competence of and strategy employed by" attorneys, are exempt from the CPA. *Id.* at 61-62.

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[6] By filing this motion, the Suttell Defendants do not concede any of the remaining elements, even assuming all allegations in the complaint are presumed true, nor do they concede any allegations in the complaint. They assert that, even if plaintiffs satisfied the other four elements, their claim could not succeed because the court filings forming the basis of the CPA claim did not occur in "trade or commerce." As discussed herein, four of the plaintiffs have failed to even allege injury to property, and their CPA claims are properly dismissed for this independent reason.

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A concurrence in *Short* cautioned that the novelty of the majority's "innovative solution to the problem of how the CPA should be applied to the practice of law" dictated that that the Supreme Court "should proceed cautiously in applying it to different factual situations." *Id.* at 72. Accordingly, to the knowledge of the Suttell Defendants, no litigant has ever successfully used the CPA to recover against his or her adversary's counsel.

In an effort to salvage part of their claim, plaintiffs may argue that a fee application is "entrepreneurial" because it broadly relates to "fees" and is motivated by counsel's desire to increase his or her recovery in a particular case. This logic would eviscerate the narrow exception articulated in *Short*: In ***every*** case in which counsel's fee is contingent, ***all*** of his or her court filings are directed to increasing the client's recovery, and in turn his or her fee. *See Carter v. Suttell & Assocs., PS*, 2011 WL 396038 (Wash. Ct. App. 2011) (to date unpublished decision) ("Merely obtaining fees, either through the judicial process or the process of billing a client, for the services rendered does not convert those services into 'entrepreneurial' actions within the meaning of *Short* and *Mosquera-Lacy*. To so hold would allow the exception to swallow the rule, such that any service rendered for profit would become subject to the CPA. This is contrary to the rule of those cases."). This "profit motive" inheres in all contingent

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representation, but it cannot, and does not, convert every court filing into a potential CPA claim by a former adversary. If it did, every lawsuit would spin off potentially endless satellite litigation in which parties would attack prior filings by its opponent's counsel as being "unfair" or "deceptive." For obvious reasons, such claims do not fall under the Consumer Protection Act, and they are properly dismissed.

2. CPA Claims Cannot Be Brought Against An Adversary's Attorney For Actions Related To The Litigation.

In addition to the limitation that CPA claims may be brought against attorneys only based on the entrepreneurial aspects of legal practice, parties may not bring CPA claims against the attorneys of their adversaries. This is because "allowing a plaintiff to sue his or her adversary's attorney under a consumer theory infringes on the attorney-client relationship." *Jeckle v. Crotty*, 120 Wn. App. 374, 384 (2004). In *Jeckle*, a doctor sued the lawyer of an adverse party, claiming that the lawyer had improperly obtained the doctor's patient files and used them to solicit clients for the lawsuit against the doctor.

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The *Jeckle* court adopted the reasoning of a line of Connecticut cases[7] standing for the proposition that "allowing a plaintiff to sue his or her adversary's attorney under a consumer theory infringes on the attorney-client relationship." *Id.* The court elaborated: "Providing a private right of action under CUTPA [the Connecticut equivalent to the CPA] to a supposedly aggrieved party for the actions of his or her opponent's attorney would stand the attorney-client relationship on its head and would compromise an attorney's duty of undivided loyalty to his or her client and thwart the exercise of the attorney's independent professional judgment on his or her client's behalf." *Id.* at 384-85 (citing *Suffield Dev. Assocs. Ltd. P'Ship v. Nat'l Loan Investors, L.P.*, 802 A.2d 44, 54 (Conn. 2002)). The *Suffield* court recognized the troubling incentives that would be created by exposing attorneys to consumer protection claims by adverse parties based on representations to a court: "[P]rotecting professional conduct from CUTPA liability ensures that no attorney is discouraged from intentional and aggressive actions, believed to be in the interest of a client, by fear of being held liable under CUTPA in the event that the action is later deemed to have been an

[7] The Washington Supreme Court also relied on Connecticut case law when creating the "entrepreneurial" exception to the general rule that legal services are exempt from the CPA. *See Short*, 103 Wn.2d at 61, 64.

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intentional deviation from the standards of professional conduct." *Id.* at 54. In other words, allowing an adversary to prosecute a CPA claim against opposing counsel would undermine the attorney's duties of undivided loyalty and zealous advocacy. *See* Rule of Professional Conduct 1.7, cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to . . . a third person or from the lawyer's own interests.").

In additional support of its holding that the *Short* exception does not allow parties to sue attorneys of their adversaries, the *Jeckle* court found that even if the plaintiff's allegations touched on the entrepreneurial aspects of the defendant's legal practice, they also involved the legal aspects of the practice. *Jeckle*, 120 Wn. App. at 385. This is an important limitation to the *Short* exception—if an activity concerns both the business (entrepreneurial) and legal aspects of practice, it cannot form the basis of a CPA claim; only those actions of lawyers that are purely entrepreneurial can form the basis of a CPA claim.

Jeckle poses an insurmountable hurdle for plaintiffs' efforts to expand the *Short* exception to cover court filings by an adversary's opponent. First, it precludes CPA claims against attorneys of adversaries based on court filings. Second, it makes clear that plaintiffs' allegations do not fall within the *Short*

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exception. Plaintiffs' allegation regarding the filing of third-party affidavits as substantive support in a prior lawsuit falls within the very essence of practicing law—in-court representation of a client. It does not relate to the entrepreneurial aspect of the Suttell Defendants' legal practice. The same is true of a court filing requesting fees by a prevailing party. Even if, however, a fee request could possibly be viewed as entrepreneurial because it touches upon fee calculation, it is also plainly related to the Suttell Defendants' legal practice because it is an in-court filing. Under *Jeckle*, an activity touching on both the business and legal aspects of practice cannot form the basis of a CPA claim.

The Suttell Defendants are not claiming that there is a general "adversarial exemption" from the CPA or that the CPA requires a consumer or business relationship. The Washington Supreme Court held to the contrary in *Panag v. Farmers Insurance Company*, concluding that a plaintiff who had been in a car accident could bring a CPA claim against the other driver's insurance company and its collection agency. 166 Wn.2d 27, 39, 42 (2009). The Court brushed aside concerns that its holding could expose attorneys to potential CPA claims for actions brought on behalf of clients: "this Court has concluded that the CPA has no application to the performance of legal services." *Id.* at 56 n.14 (also noting the entrepreneurial exception). The limited applicability of *Panag* to the present

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case is plain—it did not involve a CPA claim against an adversary's attorney for in-court filings or representations.

In addition, the Suttell Defendants are not claiming that there is a broad exemption for lawyers under the CPA. As described above, a CPA claim can be based on a lawyer's actions relating to the entrepreneurial aspects of a legal practice. *See also Eriks v. Denver*, 118 Wn.2d 451, 463-65 (1992) (holding that a lawyer's failure to disclose a potential conflict to ***his client*** could form the basis of a CPA claim if it were done to obtain clients or increase profits). A lawyer can also be sued by his client under the CPA for the performance of non-legal activities. *See Styrk v. Cornerstone*, 61 Wn. App. 463, 471 (1991) (allowing a CPA claim by ***a former client*** based on the lawyer's actions as an escrow agent). But these are claims by the attorney's ***client.*** Neither of these scenarios covers the present case, in which plaintiffs are attempting to bring a CPA claim against a prior adversary's attorney solely based on court filings—actions that are at the core of legal services.

3. Two Opinions From Sister Courts Confirm That No Washington State Court Has Adopted Plaintiffs' Interpretation Of The CPA.

At least two courts in the Western District of Washington have confronted issues similar to the one presented in this motion. Both cases were FDCPA suits

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against the attorneys of former adversaries, and both included CPA claims. Both cases were based on allegations regarding the attorneys' actions in aid of debt collection. The plaintiffs in both cases were represented by the same counsel representing plaintiffs in this case, Mr. Kinkley, and in both cases the attorney defendants moved under Rule 12(b)(6) to dismiss the CPA claims.

In the first, Judge Lasnik granted in part the law firm's 12(b)(6) motion, holding that a CPA claim cannot be based on a lawyer's alleged misrepresentations to a court, which do not fall within *Short's* "entrepreneurial aspects" exception:

> In *Short*, the attorney misrepresented his services to his client, someone with whom he was engaged in commercial activity. Here, plaintiffs make no allegation that defendant misrepresented his fees and costs to his own clients; rather, they allege that his misrepresentations were to the superior court. ***The Court holds that a court proceeding does not constitute "trade or commerce" under the CPA. The dearth of Washington case law on the applicability of the CPA to judicial proceedings only supports this conclusion.***

Medialdea v. Law Office of Evan L. Loeffler, PLLC, 2009 WL 1767185, at *8 (W.D. Wash. 2009) (emphasis added).

In a later case, Judge Settle denied the defendant attorneys' 12(b)(6) motion, distinguishing *Medialdea* in a brief analysis. *Seyfarth v. Reese Law Group, PLC*, 2010 WL 2698819, at *4 (W.D. Wash. 2010). Seeming to accept *Medialdea's* holding that in-court statements by an adversary's opponent do not

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fall within the *Short* exception, the court nonetheless noted that the *Seyfarth* plaintiff was bringing a class action and thus was attacking the defendants' fee requests as a "pattern or practice" that signified the defendants' method of "conduct[ing] their business." *Id.* The court mentioned *Jeckle's* holding that a party may not bring a CPA claim against an adversary's attorney, but noted in a single sentence that the "pattern or practice" aspect of plaintiffs' allegations made that case inapplicable. *Id.* at *4-5. Accordingly, the court held that the defendants' filed fee requests from a prior case "may constitute the entrepreneurial aspects of the practice of law," and it denied the 12(b)(6) motion. *Id.* at *5.

Both opinions seem to agree that allegations regarding the in-court representations of an adverse party's attorney do not fall within the *Short* exception and thus cannot form the basis of a CPA claim. The difference is whether there is an "exception to the exception" for an allegation that an attorney has attempted to deceive a court on multiple occasions. With due respect to Judge Settle, while alleged repetition may go to the "public interest" element, it does not go the issue of whether an attorney's court filings are or are not covered by the CPA. No state court in Washington has ever created such an exception, as evidenced by the *Seyfarth* court's failure to cite any such case and as expressly

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recognized in *Medialdea*, 2009 WL 1767185, at *8. *See also Carter*, 2011 WL 396038.

The holdings in *Medialdea* and *Jeckle* provide the correct analysis. The absence of a single on-point Washington state case, coupled with the fact that this state law claim is before the Court based on supplemental jurisdiction,[8] dictate that the Court should refuse to broadly expand the *Short* exemption, and should find that allegations against an adversary's attorney based on representations made to a court cannot form the basis of a CPA claim.

4. The Logical Consequences of Plaintiffs' Interpretation of the CPA Demonstrate Why It Cannot be Correct.

Under plaintiffs' interpretation of the CPA, a party to a lawsuit would always have the right to bring a second suit based on the in-court filings and representations of the opposing party's attorney. Even if plaintiffs attempted to limit their CPA claim to the Suttell Defendants' fee requests, unless plaintiffs advance a limiting principal, their theory would mean that every fee request filed in a Washington state court could be the subject of a later CPA suit against the

[8] Federal courts exercising diversity or supplemental jurisdiction over state law questions often refuse to extend doctrines in the absence of state law precedent. *See, e.g.*, *Maricopa Country v. Mayberry*, 555 F.2d 207, 216 (9th Cir. 1977).

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requesting lawyer. The chilling effect of such an extension would be pervasive, which is exactly what the Connecticut Supreme Court recognized when it refused to allow consumer protection suits by a party against the lawyer of an adversary:

> [W]e must . . . take care not to adopt rules which will have a chilling and inhibitory effect on would-be litigants of justiciable issues . . . . [We seek] to avoid any rule that would interfere with the attorney's primary duty of robust representation of the interests of his or her client.

Suffield Devel. Assocs. L.P., 802 A.2d at 54 (quoting *Jackson v. R.G. Whipple, Inc.*, 627 A.2d 374 (Conn. 1993)).

Carrying plaintiffs' position to its logical end demonstrates the absurdity that could result. Setting aside troubling and dispositive issues of res judicata, collateral estoppel, and *Rooker-Feldman*, if a party lost a lawsuit and was assessed fees, that party could bring a subsequent lawsuit against its adversary's attorney and argue that the attorney's fee affidavit in the earlier case had violated the CPA. If the original losing party prevailed on the subsequent CPA claim, he could seek fees under the CPA's fee-shifting provision, which would require an affidavit. But then this affidavit supporting fees in the CPA suit could form the basis of yet another CPA claim by the losing party (the attorney for the prevailing party in the original suit). Like the stairwell in an M.C. Escher sketch, this chain of lawsuits could last forever, each new suit based on an adverse attorney's filings

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in the suit before. Any theory that would allow this interpretation of a Washington statute cannot be correct and should be rejected by the Court.

B. Plaintiffs Gray, Lauber, Boolen and Finch Have Failed to Plead Injury to Business of Property

As the Court has noted in connection with prior motion practice in this consolidated litigation, a plaintiff bringing a CPA claim must establish injury to property. *See* Dkt No. 299 at 11-12 (Court Order discussing defect in claims that fail to allege injury to property); *Hangman Ridge,* 105 Wn.2d at 780. Plaintiffs' Amended Complaint includes such an allegation for Dane Scott (¶ 8.29), but not for plaintiffs Gray, Lauber, Boolen and Finch. As such, even if all CPA claims were not dismissed as to all plaintiffs for the reasons set forth above, such claims must be dismissed as to Gray, Lauber, Boolen and Finch for failure to state an essential element of their claim.

III. CONCLUSION

A CPA claim cannot be based on the court filings of an adversary's attorney. Such a claim does not fit within *Short's* narrow "entrepreneurial" exception, and is further barred by *Jeckle's* prohibition on CPA suits against an adversary's attorney based on in-court filings and representations. The Court should decline an invitation to extend *Short's* exception and modify *Jeckle's* prohibition, particularly in light of the absence of support in Washington case

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law, as recognized in *Medialdea*. Finally, the potential consequences that would result if plaintiffs' interpretation became law illustrate that it cannot be correct and is highly unlikely to be adopted by a Washington state court that eventually confronts the question.

The Suttell Defendant's motion should be granted, and plaintiffs' CPA claims against the Suttell Defendants should be dismissed. If a CPA claim survives, the CPA claims of plaintiffs Gray, Lauber, Boolen and Finch are still properly dismissed for want of any alleged injury to property.

DATED this 25th day of April, 2011.

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on April 25, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 25th day of April, 2011.

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